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**SC83805**

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**IN THE SUPREME COURT OF MISSOURI**

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**BEVERLY SUE RYAN, P.A.,  
CONSERVATOR FOR THE ESTATE OF RUTH SPIEGELHALTER  
Respondent,**

**vs.**

**WILLIAM SPIEGELHALTER, ET AL.,  
Respondents,**

**GARY AND TERESA GABEL,  
Appellants.**

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**Appeal from the Circuit Court of Clay County, Missouri  
Probate Division  
The Honorable Larry D. Harman**

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**APPELLANTS' SUBSTITUTE BRIEF**

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### **JURISDICTIONAL STATEMENT**

Appellants, Gary Gabel and Teresa Gabel, appeal from a final judgment entered by the Probate Division of the Circuit Court of Clay County, the Honorable Larry D. Harman, on March 9, 2000,

when the probate court entered judgment in favor of respondent on her Petition for discovery of assets in the amount of \$36,502.54, plus pre-judgment interest at the statutory rate from February 27, 1998, plus costs. Appellants contend that the trial court erred in denying their motion to dismiss, erred in awarding a money judgment against them, and lacked subject matter jurisdiction to proceed on a breach of contract claim in a discovery of assets proceeding.

The Missouri Court of Appeals, Western District, affirmed the probate court judgment in a written opinion filed May 22, 2001. Appellants filed their motion for rehearing and motion for transfer to this Court on June 6, 2001, which were both denied by the Court of Appeals on July 3, 2001. Appellants filed their direct application for transfer in this Court on July 18, 2001.

Appellants' application for transfer from the Missouri Court of Appeals, Western District, to the Missouri Supreme Court was sustained by this Court on August 21, 2001. Therefore, jurisdiction of this appeal is vested in this Court pursuant to Article V, Section 10 of the Constitution of the State of Missouri, 1945, as amended.

### **STATEMENT OF FACTS**

Ruth Alice Spiegelhalter (hereinafter "Mrs. Spiegelhalter") is the mother of eight children, namely: William Spiegelhalter, Mary Ann Wilson, John Spiegelhalter, Jane Weimhold, Albert T.



Spiegelhalter, Sr., Teresa Gabel, James Spiegelhalter, and Albert Michael Spiegelhalter.<sup>1</sup> She is also the mother-in law of appellant Gary Gabel. (L.F.15). Mrs. Spiegelhalter is in her eighties. (T. 222).

After her husband's death in April 1978, Mrs. Spiegelhalter resided at 12 N.E. 88th Terr., Kansas City, Missouri. (T. 110, 153). At some time prior to December 3, 1988, some of the Spiegelhalter children discussed a move of Mrs. Spiegelhalter from 12 N.E. 88th Terr. (T. 111,112). This discussion concerned moving Mrs. Spiegelhalter into a one level condominium that would be more convenient for her so she would not have to go up stairs since she was getting up in age. (T. 118).

Gary Gabel is a home builder and a real estate developer. (T. 7).<sup>2</sup> He entered into a written joint venture agreement with an individual named Ron Topham to develop the Kingston Court Condominium project. (T. 11-12, Motion to Dismiss EX 4). One of the condominium units was being built for Mrs. Spiegelhalter. (T. 197). The address of the property was 7140 Kingston Court. (T. 198). Legal title to the property was in the name of Ron Topham, Gary Gabel's joint venture partner. (T. 202-03).

A written contract for the sale of a condominium unit located at 7140 Kingston Court was prepared on or about January 15, 1988, between Kingston Court Development Company and Ruth Spiegelhalter. (L.F. 35, Motion to Dismiss EX 2 ). This contract set forth a sales price for the condominium of \$76,900.00. (L.F. 35, Motion to Dismiss EX 2). Legal title to the condominium was

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<sup>1</sup> Although named as "Albert Francis Spiegelhalter" in the Petition for Discovery of Assets, this defendant's correct name is "Albert Michael Spiegelhalter." (L.F. 13, 42).

<sup>2</sup> Transcript references to pages 1 through 32 are from the evidence heard by the trial court on the motions to dismiss of Gary Gabel, Teresa Gabel and Jane Weimhold.

not transferred to Mrs. Spiegelhalter under this contract since she could not get her end loan to go forward on it. (T. 10). Mrs. Spiegelhalter was not able to perform under this contract. (T. 14)

On December 3, 1988, another written contract for the sale of the same condominium unit was prepared for Mrs. Spiegelhalter. (L.F. 37, EX 6, T. 217-18, Motion to Dismiss EX 1). This document reflects a sales price of \$60,000.00 payable \$49,000.00 at closing with the seller financing the balance of the purchase price, \$11,000.00 for 15 years at 10% interest. (L.F. 37, EX 6, T. 217-18, Motion to Dismiss EX 1). Legal title was not transferred to Mrs. Spiegelhalter under the December 3, 1988 contract (T. 10). Mrs. Spiegelhalter made a down payment on the condominium of \$49,000.00. (T. 11). She was not able to perform under the December 3, 1988 contract. (T. 14).

A third written contract, a contract for deed, was entered into between Kingston Court Development Company and Mrs. Spiegelhalter on or about December 20, 1988. (T. 9, Motion to Dismiss EX 3). This contract reflects a sales price of \$78,000.00 payable as follows: \$49,000.00 down, with the balance payable at the rate of \$235.00 per month until the amount of \$18,000.00 is paid, and further provides that seller carry an additional second mortgage in the amount of \$11,000.00 with no payments due until the unit is sold. (Motion to Dismiss EX 3). Mrs. Spiegelhalter was not able to perform under the contract for deed. (T. 14).

On or about December 3, 1988, Mrs. Spiegelhalter moved to 7140 Kingston Court, Gladstone, Missouri. (T. 110, 114). In 1989, Mrs. Spiegelhalter suffered a stroke which required her to be hospitalized for approximately two weeks.<sup>3</sup> (L.F. 11, T. 37, 146, 152-53).

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<sup>3</sup> The Judgment and Order of Incapacity and Disability states that Mrs. Spiegelhalter suffered her stroke in 1988. (L.F. 11). However, the Judgment in the Discovery of Assets case states that Mrs.

After her stroke, Mrs. Spiegelhalter resided at the Kingston Court address until May of 1998. (T. 115). Mrs. Spiegelhalter also resided with her daughter, Jane Ruth Weimhold, in Kansas City, Missouri off and on from December 3, 1988 through May 1998. (T. 115-116). She also resided with Teresa and Gary Gabel off and on from 1988 through 1998, when she was ill. (T. 115-116). Mrs. Spiegelhalter requires help with every facet of daily living and requires total care and 24 hour supervision. (L.F. 11). She never resided with any of her other children from 1988 through May 1998. (T. 116). Since May 1998, Mrs. Spiegelhalter has resided at Woodbine Health Care Centre. (T. 115).

In the spring or summer of 1995, some of the Spiegelhalter children participated in a family meeting to discuss future plans for Mrs. Spiegelhalter. (T. 119). Present at this family meeting were Albert T. Spiegelhalter, Sr., John Spiegelhalter, Mary Ann Wilson, William Spiegelhalter, Jane Weimhold, Albert Michael Spiegelhalter and Teresa Gabel. (T. 120-21). The family members present at the 1995 family meeting discussed a number of things, one of which was that somebody in the family should buy the condominium since it was not in the name of any family member or Mrs. Spiegelhalter but in the name of Kingston Court Development Corporation. (T. 198).

At the 1995 family meeting, it was discussed that two people should be on the title to 7140 Kingston Court. (T. 201). John Spiegelhalter entered into an agreement to purchase this property. (T. 201-02). None of the other Spiegelhalter siblings agreed to be a co-owner of the property. (T. 201).

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Spiegelhalter suffered her stroke in 1989. (L.F. 105). Additionally, Mrs. Ryan testified that Mrs. Spiegelhalter suffered her stroke in 1989. (T. 37). Albert T. Spiegelhalter, Sr., also testified that his mother suffered her stroke in 1989 (T. 146, 152-53).

Also discussed at this meeting was the selling price of the condominium back in 1988. (T. 119-20).

The probate court specifically found:

There is obvious acrimony among some of the family members.

There have been "accusations" and "cross-accusations" by various members of the family as to who has possession of certain items of personal property that at one time belonged to Ruth Spiegelhalter.

(L.F. 105,106).

James A. Spiegelhalter had no regular conversations with his siblings. (T. 164). He does recall Albert T. Spiegelhalter, Sr., requesting that he sign over financial accounts to him. (T. 164). Albert T. Spiegelhalter, Sr., testified he is on speaking terms with Jim [James A. Spiegelhalter] but that Jim is not on speaking terms with him. (T. 150). Albert also testified that he wanted James A. Spiegelhalter to sign over financial accounts to him so they could be "consolidated under one roof." (T. 150-51).

Albert T. Spiegelhalter, Sr. testified that Terri Gabel said the selling price of 7140 N. Kingston Court was \$60,000.00 and that the Gabels were carrying an \$11,000.00 note. (T. 120). Mary Ann Wilson testified that at the family meeting held in 1995, Terrie Gabel did not say the selling price of the condominium was \$60,000.00. (T. 187-88). John Spiegelhalter testified that he heard a \$60,000.00 selling price of 7140 N. Kingston Court thrown around, but he never knew the final amount. (T. 224). James A. Spiegelhalter was not present at any family meeting and had no knowledge of the 7140 N. Kingston Court transaction. (T. 160). Gary Gabel testified that comparable units to 7140 N. Kingston Court were selling for \$85,000.00 in 1988. (T. 19).

John Spiegelhalter does not remember when he entered into the agreement to purchase the property, however, Ron Topham, Gary Gabel's joint venture partner delivered a warranty deed to John

Spiegelhalter in April 1996 for the property at 7140 Kingston Court. (T. 202-03, EX 9). The sale from Kingston Court Development Company and delivery of the warranty deed to John Spiegelhalter all happened at that time. (T. 201-02).

The purchase price set forth in the contract for sale to John Spiegelhalter is \$85,000.00. (T. 204-05, EX 18). This price included the \$49,000.00 down payment, a \$1,000.00 earnest deposit and \$35,000.00 to clear existing liens on the property. (T. 205-06). Sometime between June and December 1997, John Spiegelhalter took out a second mortgage on his personal residence to pay off the \$35,000.00 indebtedness on the property at 7140 Kingston Court. (T. 210). John Spiegelhalter testified that he paid \$35,000.00 out of the loan proceeds to the Gabels at that time. (T. 210).

Later in 1997, John Spiegelhalter agreed to list that property for sale. (T. 211). John Spiegelhalter received a contract for the sale of the property on January 22, 1998 from a Nancy Pummel. (T. 211-12, EX 10). This contract stated a sale price of \$101,000.00. (T. 212, EX 10). According to the settlement statement dated February 27, 1998, after deduction for ordinary expenses of sale, the net proceeds were \$91,822.54. (T. 212-213, EX 7). Out of the net proceeds, John Spiegelhalter paid off the second mortgage on his personal residence which then had a balance of \$33,960.23. (T. 213, EX 7). Also, \$862.00 was deducted for repairs to make the property ready for sale, and \$3,580.00 was deducted for estimated tax liability. (T. 214, EX 7). John Spiegelhalter paid the balance of \$53,420.00 to Beverly Sue Ryan's office as the conservator for Mrs. Spiegelhalter's estate. (T. 215, EX 7). Finally, John Spiegelhalter paid to Beverly Sue Ryan, in the same capacity, \$1,900.00 representing a partial escrow refund. (T. 215).

Mrs. Spiegelhalter was declared legally disabled and incapacitated by the probate division of the Clay County Circuit Court on February 6, 1998. (L.F. 11, 105). There was no finding as to when

the disability and incapacity of Mrs. Spiegelhalter factually or actually occurred. (L.F. 105). After she suffered her stroke in 1989, Mrs. Spiegelhalter told James Spiegelhalter which checks to write for her. (T. 162-63). Mary Kay Spiegelhalter, daughter of Albert T. Spiegelhalter, Sr. testified, in part:

Q. PLEASE TELL THE COURT HOW YOU CAME IN  
POSSESSION OF THESE EARRINGS?

A. APPROXIMATELY 1992 WE HAD A DISCUSS, GRANDMA  
HAD TOLD ME--  
....

A. GRANDMA HAD SAID THAT SHE WAS GOING TO HAVE  
YOU GIVE ME THOSE EARRINGS BECAUSE SHE SAID THAT  
SHE WANTED ME TO WEAR THEM WHEN I MARRIED STEVE  
JOHNSON.

THAT WAS SHE REALLY LIKED STEVE. . . . AND SO, SHE  
SAID THAT SHE WANTED ME TO HAVE THOSE AND TO WEAR  
THEM ON MY WEDDING DAY.

(T. 170). Mrs. Spiegelhalter was not able to sign her name on rent checks payable to John Spiegelhalter in 1997. (T. 207). However, this was because of her inability to move her arm and hand, not her health. (T. 208).

Beverly Sue Ryan, Public Administrator of Clay County, Missouri (hereinafter "Mrs. Ryan"), was appointed conservator of her estate, and John A. Spiegelhalter, was appointed as the guardian of her person.(L.F. 11-12, 105).<sup>4</sup>

On December 11, 1998, Mrs. Ryan filed a fourteen count Petition for Discovery of Assets, Accounting and Other Relief in the Probate Division of the Clay County Circuit Court. (L.F. 13). The Petition named all of Mrs. Spiegelhalter's children, William Spiegelhalter, Mary Ann Wilson, John Spiegelhalter, Jane Weimhold, Albert T. Spiegelhalter, Sr., Teresa Gabel, James Spiegelhalter, and Albert Francis Spiegelhalter, as defendants.<sup>5</sup> (L.F. 13). Gary Gabel, husband of Teresa Gabel, was also named as a defendant under Count 10 of the Petition. (L.F. 13, 27).

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<sup>4</sup> The Judgment entered, which is the subject of this appeal, states that Mrs. Ryan was appointed as Mrs. Spiegelhalter's guardian in addition. (L.F. 105). However, the Judgment and Order of Incapacity and Disability entered by the probate court on February 6, 1998 appoints Mrs. Spiegelhalter's son, John A. Spiegelhalter as the guardian of her person. (L.F. 11-12).

<sup>5</sup> In his Answer to Mrs. Ryan's Petition, defendant/respondent Albert T. Spiegelhalter declared:

1. Defendant denies the allegation contained in Paragraph 10 of Plaintiff's Petition and further states that Albert Francis Spiegelhalter is not a son of Ruth Spiegelhalter, but rather a person who Ruth Alice Spiegelhalter raised. (L.F. 40).

Similarly, defendant/respondent Mary Ann Wilson states the following in her Answer:

1. Defendant denies the allegation contained in Paragraph 10, and later incorporated in Paragraph 16, of Plaintiff's Petition and further states that Albert Francis Spiegelhalter is not a son of Ruth Spiegelhalter, but rather a person who Ruth Alice Spiegelhalter raised. Defendant is unaware of any legal proceedings resulting

On February 5, 1999, the Gabels filed an Answer to the Petition setting forth affirmative defenses of lack of subject matter jurisdiction and bar of the statute of limitations. (L.F. 2,61-73). On this same date, the Gabels also filed a motion to dismiss with the probate court also contending that it lacked subject matter jurisdiction and that the claims against them under Count 10 of Ms. Ryan's Petition were barred by the applicable statute of limitations. (L.F. 2, 77-79). On June 2, 1999, the Gabels presented evidence to the probate court in support of their motion to dismiss. (T. 1-32).

Gary Gabel testified that he was a real estate developer and entered into a join venture agreement with a Ron Topham. (T. 7-8, 11-12). The entity was named Kingston Court Development Company. (T. 14). Under the agreement, Gary Gabel had authority to enter into contracts on behalf of Kingston Court Development Company. (T. 12, Motion to Dismiss EX 4).

Gary Gabel testified that the contract dated December 3, 1988 did not have the correct sales price on it. (T. 7, Motion to Dismiss EX 1). Furthermore, the earlier contract dated January 15, 1988 was between Kingston Court Development Company and Ruth Spiegelhalter and she was not able to perform under it. (T. 14, Motion to Dismiss EX 2). Finally, Gary Gabel testified to the contract for deed between Kingston Court Development Company and Ruth Spiegelhalter, which was the final contract entered into after prior negotiations. (T. 9, Motion to Dismiss EX 3). Mrs. Spiegelhalter was not able to perform under this contract either. Finally, Gary Gabel also testified at this hearing that the reason title was never transferred to Mrs. Spiegelhalter was because she never could get her end of the loan to go forward. (T. 10).

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in adoption of Albert Francis Spiegelhalter by Ruth Alice

Spiegelhalter. (L.F. 47).



The official transcript reflects "(CAUSE SET FOR TRIAL ON ALL REMAINING ISSUES ON OCTOBER 15TH AT 9 O'CLOCK A.M.). (T. 32). On October 15, 1999, the probate court heard Ms. Ryan's evidence. (T. 33). The cause was continued to October 20, 1999, when the probate court received additional evidence from Ms. Ryan. (T. 233).

At the close of Ms. Ryan's case, the Gabels orally moved the probate court to dismiss with regard to Count 10 and renewed the written motion filed February 5, 1999. (T. 248). On October 6, 1999, Ms. Ryan voluntarily dismissed Counts 13 and 14 of her Petition pertaining to Albert Michael Spiegelhalter. (L.F. 103). On March 10, 2000, the probate court entered a written judgment in favor of all respondents and against Ms. Ryan on Counts 1,2,3,4,5,6,7,8,9,11, and 12.(L.F. 5, 105). The probate court entered judgment against Teresa and Gary Gabel under Count 10 of the Petition, awarding Ms. Ryan on behalf of Ruth Spiegelhalter judgment in the amount of \$36,502.54, plus interest at the statutory rate from February 27, 1998, plus costs. (L.F. 105, 112). On April 10, 2000, the Gabels filed their notice of appeal with the Clay County Circuit Clerk, Probate Division. (L.F. 114) It is from this final judgment which the Gabels appeal to this Court.

### **POINTS RELIED ON**

- 1. THE PROBATE COURT ERRED WHEN IT ENTERED JUDGMENT IN FAVOR OF BEVERLY SUE RYAN AND AGAINST GARY AND TERESA GABEL UNDER COUNT 10 OF THE DISCOVERY OF ASSETS CASE**

**BECAUSE MRS. RYAN FAILED TO PROVE BY SUBSTANTIAL EVIDENCE THAT GARY GABEL AND TERESA GABEL ADVERSELY WITHHELD OR CLAIMED AN INTEREST IN REAL PROPERTY LOCATED AT 7140 KINGSTON COURT IN THAT NO EVIDENCE WAS PRESENTED AS TO WHEN MRS. SPIEGELHALTER BECAME DISABLED AND INCAPACITATED, AND GARY AND TERESA GABEL HAD NO INTEREST IN 7140 KINGSTON COURT WHEN MRS. SPIEGELHALTER WAS ADJUDICATED INCAPACITATED AND DISABLED ON FEBRUARY 6, 1998.**

State ex rel. Knight v. Harman, 961 S.W.2d 951 (Mo. App. 1998)

§475.160 R.S.Mo.

§475.340 R.S.Mo.

Cohen v. Crumpacker, 586 S.W.2d 370 (Mo. App. 1979)

Murray v. Rockwell, 952 S.W.2d 350 (Mo. App. 1997)

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc. 1976)

Klugesherz v. American Honda Motor Co., 929 S.W.2d 811 (Mo. App. 1996)

Fujita v. Jeffries, 714 S.W.2d 202 (Mo. App. 1986)

McGraw v. Andes, 978 S.W.2d 794 (Mo. App. 1998)

Price v. Price, 921 S.W.2d 668 (Mo. App. 1996)

**2. THE PROBATE COURT ERRED WHEN IT DENIED THE GABELS' MOTION TO DISMISS FILED PRIOR TO TRIAL AND AFTER**

**EVIDENCE WAS HEARD ON THAT MOTION REGARDING COUNT 10 OF THE PETITION DENOMINATED AS A "DISCOVERY OF ASSETS" CAUSE BECAUSE THE PROBATE COURT LACKED SUBJECT MATTER JURISDICTION TO HEAR AND DETERMINE THAT CAUSE IN THAT THE PROBATE COURT IS A COURT OF LIMITED JURISDICTION AND IT COULD NOT HEAR AND DETERMINE THE COMMON LAW TORT CLAIMS AND BREACH OF CONTRACT CLAIMS WHICH WERE ASSERTED BY BEVERLY SUE RYAN.**

State ex rel. Knight v. Harman, 961 S.W.2d 951 (Mo. App. 1998)

§472.020 R.S.Mo.

§475.160 R.S.Mo.

In re Estate of Goldenberg, 601 S.W.2d 637 (Mo. App. 1980)

Matter of Estate of Woodrum, 859 S.W.2d 259 (Mo. App. 1993)

Parmer v. Bean, 636 S.W.2d 691 (Mo. App. 1982)

Cook v. Polineni, 967 S.W.2d 687 (Mo. App. 1998)

**3. THE PROBATE COURT ERRED WHEN IT DENIED THE GABELS' MOTION TO DISMISS FILED PRIOR TO TRIAL REGARDING COUNT 10 OF THE PETITION BECAUSE COUNT 10 WAS ABSOLUTELY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, EITHER §516.110 R.S.MO. (1994), THE TEN YEAR STATUTE, OR §516.120 R.S.MO. (1994), THE FIVE**

**YEAR STATUTE, IN THAT BEVERLY SUE RYAN FILED HER LAWSUIT ON  
DECEMBER 11,  
1998, AND THE WRITTEN CONTRACT UPON WHICH SHE BASES HER  
LAWSUIT WAS DATED EITHER JANUARY 15, 1988 OR DECEMBER 3,  
1988, AND THE RIGHT TO SUE, IF ANY, AROSE AT THE TIME THE  
GABELS FAILED TO DELIVER A DEED TO MRS. SPIEGELHALTER.**

Jordan v. Willens, 937 S.W.2d 291 (Mo. App. 1996)

Cohen v. Crumpacker, 586 S.W.2d 370 (Mo. App. 1979)

§516.110 R.S.Mo.

§516.120 R.S.Mo.

Lomax v. Sewell, 1 S.W.3d 548 (Mo. App. 1999)

Rule 55.08

Hughes Development Co. v. Omega Realty Co., 951 S.W.2d 615 (Mo. banc. 1997)

Local 719 Intern. Ass'n of Firefighters v. City of Independence, 996 S.W.2d 112

(Mo. App. 1999)

### **ARGUMENT**

**1. THE PROBATE COURT ERRED WHEN IT ENTERED JUDGMENT IN  
FAVOR OF BEVERLY SUE RYAN AND AGAINST GARY AND TERESA  
GABEL UNDER COUNT 10 OF THE DISCOVERY  
OF ASSETS CASE BECAUSE MRS. RYAN FAILED TO PROVE BY  
SUBSTANTIAL EVIDENCE THAT GARY GABEL AND TERESA GABEL**

**ADVERSELY WITHHELD OR CLAIMED AN INTEREST IN REAL PROPERTY LOCATED AT 7140 KINGSTON COURT IN THAT NO EVIDENCE WAS PRESENTED AS TO WHEN MRS. SPIEGELHALTER BECAME DISABLED AND INCAPACITATED, AND GARY AND TERESA GABEL HAD NO INTEREST IN 7140 KINGSTON COURT WHEN MRS. SPIEGELHALTER WAS ADJUDICATED INCAPACITATED AND DISABLED ON FEBRUARY 6, 1998.**

**STANDARD OF REVIEW**

The appellants contend that the trial court erred in this court-tried case by entering judgment against them under Count 10 of the petition for discovery of assets and in favor of Beverly Sue Ryan because the court's judgment was not supported by substantial and competent evidence. In a court tried case, the judgment of the trial court will be affirmed unless:

1. There is no substantial evidence to support the judgment; or
2. The judgment is against the weight of the evidence; or
3. The judgment erroneously declares or applies the law.

Murray v. Rockwell, 952 S.W.2d 350, 352 (Mo.App.1997) (Citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc.1976)). Additionally, "[this Court] defer[s] to the trial court's determination of credibility, viewing the evidence and inferences therefrom in the light most favorable to the . . . [judgment] and disregarding all contrary evidence and inferences." Id. (quoting Price v. Price, 921 S.W.2d 668, 671 (Mo. App.1996) and Rule 73.01(c)(2)).

Substantial evidence is defined as:

evidence which, if true, has probative force upon the issue, i.e.,

evidence favoring facts which are such that reasonable men may differ as to whether it establishes them; it is evidence from which the trier or triers of the fact reasonably could find the issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from it the facts, to establish which the evidence was introduced.

Fujita v. Jeffries, 714 S.W.2d 202, 206 (Mo.App.1986). "In order to make a submissible case, it is incumbent on the plaintiff to present substantial evidence supporting each element of his claim." McGraw v. Andes, 978 S.W.2d 794, 802 (Mo. App. 1998). Furthermore, "[a] mere scintilla of evidence is insufficient." Klugesherz v. American Honda Motor Co., 929 S.W.2d 811, 813 (Mo. App. 1996). "The question of whether evidence in a case is substantial and whether the inferences drawn are reasonable are questions of law." Id. Furthermore, "[i]n determining whether a submissible case is made, . . . [this Court should] review the evidence in the light most favorable to the plaintiff, giving the plaintiff the benefit of all reasonable inferences and disregarding defendant's evidence except insofar as it may aid the plaintiff's case." Id.

Beverly Sue Ryan instituted this "discovery of assets" action as the conservator of the estate of Ruth Alice Spiegelhalter to recover property consisting of personal effects, furniture, an automobile, real estate, cash and other items which she alleged was in the possession of the named defendants and properly belonged to the estate. A lawsuit for discovery of assets by a conservator is controlled by §475.160 R.S.Mo. 1994 which provides:

**475.160. Assets of protectee, action to obtain, procedure - Any**

conservator, protectee, creditor or other person, including a person interested in expectancy, reversion or otherwise, who claims an interest in property which is claimed to be an asset of the estate of a protectee or which is claimed should be an asset of such an estate, may file a verified petition in any court having jurisdiction of such estate seeking determination of the title and right of possession thereto. The petition shall describe the property, if known, shall allege the nature of the interest of the petitioner and that title or possession of the property, or both, are being adversely withheld or claimed. The court shall proceed on such petition in accordance with the provisions of section 473.340, R.S.Mo.

Section 473.340 R.S.Mo., establishes a similar cause of action to recover property alleged to be adversely withheld from a decedent's estate.

As this Court recently stated, "[a] discovery of assets action, as its name implies, is a search for assets." State ex rel. Knight v. Harman, 961 S.W.2d 951, 954 (Mo. App. 1998). Furthermore, "[t]he action is a 'statutory proceeding similar to the common law actions for trover and conversion.'" Id. The purpose of a discovery of assets action "is to determine whether 'the decedent held title at his death to certain described property and that this property is being adversely withheld by another person.'" Id. at 954-55.

Mrs. Ryan's lawsuit consisted of fourteen counts against Mrs. Spiegelhalter's children and Gary Gabel. (L.F. 13-21). She voluntarily dismissed Counts 13 and 14 prior to trial. (L.F. 103). The

probate court entered judgment for all defendants on the remaining counts, except Teresa and Gary Gabel with respect to Count 10, finding:

With regard to counts 1,2,3,4,5,6,7,8,9,11,12, and 13, the court finds that there was insufficient proof that the assets claimed as being owned presently by Ruth Spiegelhalter are still currently owned by her and are being wrongfully withheld from the conservator, acting on behalf of the estate. Certain items claimed in the foregoing counts were the subject of gifts made many years ago. Other items claimed as being assets of the estate have little monetary value and hold sentimental value only by certain people who possess them, or those who may want them. Certain counts are moot because restitution has been made to the estate. Certain counts related to the creation of joint tenancies with Ruth Spiegelhalter, dating back several years, but there was insufficient proof that any of these accounts were misused [sic] or mishandled by any of the joint tenants, **or were created as a result of duress or undue influence.**

[Emphasis added].

(L.F. 107-08). The bank accounts referred to by the probate court in its March 9, 2000 judgment were jointly held by various Spiegelhalter children as early as 1978 and as late as 1997. (L.F. 156, 131). Similarly, the probate court specifically held there was no evidence of undue influence regarding the creation of these joint tenancy bank accounts. (L.F. 108).



The Gabels appeal from judgment entered against them under Count 10 of plaintiff's petition for "discovery of assets" wherein the court entered judgment against them in the sum of \$36,502.54, plus prejudgment interest at the statutory rate from February 27, 1998, plus costs. In Count 10 of her Petition, Beverly Sue Ryan alleges, among other things:

57. Plaintiff, based upon information and belief, believes that Defendants Teresa Gabel and Gary Gabel purported to sell a townhouse located at 7140 N. Kingston Court Dr., Gladstone, Clay County, Missouri to Ruth Alice Spiegelhalter on either January 15, 1988 or on December 3, 1998. A copy of two Contracts for the sale of Real Estate are attached hereto as Exhibits A and B and incorporated herein by reference.

58. Plaintiff based upon information and belief believes that \$49,000.00 was removed from a bank account of Ruth Alice Spiegelhalter and paid to Defendants toward the purported purchase of said residence and that Defendants agreed to carry an \$11,000.00 note for the balance of the purchase price.

59. At the time of said sale, title to said residence was not transferred to Ruth Alice Spiegelhalter as said Defendants did not own said residence as title appeared to be vested in Ronald Topham and Ann Topham, husband and wife.

....

64. Said residence was subsequently sold in 1998 for the sum of

\$101,000.00.

65. Defendants have retained the proceeds from the 1998 sale of the residence which rightfully belong to Ruth Alice Spiegelhalter.

66. Plaintiff has received the sum of \$53,420.00 from the 1998 sale of said residence.

(L.F. 27-28).

Additionally, there was no finding as to when the disability and incapacity of Mrs. Spiegelhalter factually or actually occurred. (L.F. 105). After she suffered her stroke in 1989, Mrs. Spiegelhalter told James Spiegelhalter which checks to write for her. (T. 162-63). Mary Kay Spiegelhalter, daughter of Albert T. Spiegelhalter, Sr. testified, in part:

Q. PLEASE TELL THE COURT HOW YOU CAME IN POSSESSION OF THESE EARRINGS?

A. APPROXIMATELY 1992 WE HAD A DISCUSS, GRANDMA HAD TOLD ME--

....

A. GRANDMA HAD SAID THAT SHE WAS GOING TO HAVE YOU GIVE ME THOSE EARRINGS BECAUSE SHE SAID THAT SHE WANTED ME TO WEAR THEM WHEN I MARRIED STEVE JOHNSON.

THAT WAS SHE REALLY LIKED STEVE. . . . AND SO, SHE SAID THAT SHE WANTED ME TO HAVE THOSE AND TO WEAR THEM ON MY WEDDING DAY.

(T. 170). Mrs. Spiegelhalter was not able to sign her name on rent checks payable to John Spiegelhalter in 1997. (T. 207). However, this was because of her inability to move her arm and hand, not her health. (T. 208).

Generally, "[w]hile a contract made by one under a guardianship by reason of incompetency is void, a contract made prior to adjudication but while the person is under mental disability is only voidable." Cohen v. Crumpacker, 586 S.W.2d 370, 374 (Mo. App. 1979). Ms. Ryan pleads no facts to rebut this presumption of competency of Mrs. Spiegelhalter prior to the probate court's February 6, 1998 adjudication. From Ms. Ryan's own pleadings, and from the evidence she presented at trial, it is apparent that Mrs. Spiegelhalter's Estate was reimbursed the entire deposit she paid in 1988, \$49,000.00, plus an additional \$4,420.00. (L.F. 27-28, T. 213-15).

Mrs. Ryan's own evidence at trial belies her pleading under Count 10 that the Gabels retained the proceeds from the 1998 sale of 7140 Kingston Court. Her evidence was that the property at 7140 Kingston Court was conveyed to John Spiegelhalter by warranty deed dated in April of 1996, from Ron Topham, Gary Gabel's partner. (T. 201-03, EX 9). John Spiegelhalter entered into a contract on with Kingston Court Development Company, not Gary Gabel, for the purchase of 7140 Kingston Court in 1996. (T. 204-05, EX 18). The purchase price was \$85,000.00 payable \$1,000.00 in earnest money, conventional financing in the amount of \$35,000.00 to clear loans on the property, with a balance due at closing of \$49,000.00. (T. 204-05, EX 18).

John Spiegelhalter then obtained a second mortgage on his residence to obtain the \$35,000.00 necessary to clear the debt owing on the property. (T. 205-06). This \$35,000.00 was paid to the Gabels at the time John Spiegelhalter obtained the loan on his residence. (T. 210). Subsequently, on

January 21, 1998, John Spiegelhalter received a contract for the sale of the property. (T. 211-12, EX 10).

Per the settlement statement relating to the January 21, 1998 sale, John Spiegelhalter, not the Gabels, received net proceeds of \$91,822.54. (T. 212-13, EX 7). Out of the net proceeds, John Spiegelhalter paid off the second mortgage on his residence in the balance of \$33,960.23. (T. 213-14, EX 7). He also withheld an escrow for anticipated tax liability in the amount of \$3,580.00. (T. 214, EX 7). Finally, \$53,420.00 was paid to Ms. Ryan on behalf of Mrs. Spiegelhalter. (L.F. 28, T. 94-95).

Mrs. Ryan does not allege that John Spiegelhalter adversely withheld any money or property out of any transaction involving 7140 N. Kingston Court. He is not even named in Count 10 of her Petition. (L.F. 27-29). John Spiegelhalter repaid a second mortgage to himself used to clear loans against the property so that he could close on it and later sell it for \$101,000.00.

There was no evidence before the probate court, let alone substantial evidence that the Gabels adversely withheld and property belonging to Mrs. Spiegelhalter's estate. Mrs. Spiegelhalter was declared incapacitated and disabled on February 6, 1998. (S.O.F. at 11). The Gabels had no ownership interest whatsoever in 7140 Kingston Court after April of 1996 when the condominium was purchased by John Spiegelhalter. (S.O.F. at 10). Mrs. Spiegelhalter's entire down payment was returned to her estate plus an additional \$4,420.00. (S.O.F. at 11 ). Finally all proceeds from the 1998 sale of the condominium were received by John Spiegelhalter, not the Gabels. (S.O.F. at 11). The probate court made no finding that John Spiegelhalter adversely withheld property of Mrs. Spiegelhalter's estate and should have similarly entered judgment for the Gabels under Count 10 of Ms. Ryan's Petition.

**2. THE PROBATE COURT ERRED WHEN IT DENIED THE GABELS' MOTION TO DISMISS FILED PRIOR TO TRIAL AND AFTER EVIDENCE WAS HEARD ON THAT MOTION REGARDING COUNT 10 OF THE PETITION DENOMINATED AS A "DISCOVERY OF ASSETS" CAUSE BECAUSE THE PROBATE COURT LACKED SUBJECT MATTER JURISDICTION TO HEAR AND DETERMINE THAT CAUSE IN THAT THE PROBATE COURT IS A COURT OF LIMITED JURISDICTION AND IT COULD NOT HEAR AND DETERMINE THE COMMON LAW TORT CLAIMS AND BREACH OF CONTRACT CLAIMS WHICH WERE ASSERTED BY BEVERLY SUE RYAN.**

**STANDARD OF REVIEW**

The Gabels contend that the probate court erred when it denied their motion to dismiss Ms. Ryan's "Discovery of Assets" Petition because the probate court lacked subject matter jurisdiction to hear common law tort claims and claims for breach of contract. A motion to dismiss for lack of subject matter jurisdiction can raise factual issues. However, when there is not factual dispute at issue, "the question of jurisdiction is purely one of law." Parmer v. Bean, 636 S.W.2d 691, 694 n.1 (Mo. App. 1982). Under this point, no factual issues are raised, and this Court reviews the decision of the probate court de novo. Cook v. Polineni, 967 S.W.2d 687, 690 (Mo. App. 1998).

Under Count 10 of her Petition, denominated as a "Discovery of Assets" action, Ms. Ryan alleges:

57. Plaintiff, based upon information and belief, believes that

Defendants Teresa Gabel and Gary Gabel purported to sell a townhouse located at 7140 N. Kingston Court Dr., Gladstone, Clay County, Missouri to Ruth Alice Spiegelhalter on either January 15, 1988 or on December 3, 1998. A copy of two Contracts for the sale of Real Estate are attached hereto as Exhibits A and B and incorporated herein by reference.

58. Plaintiff based upon information and belief believes that \$49,000.00 was removed from a bank account of Ruth Alice Spiegelhalter and paid to Defendants toward the purported purchase of said residence and that Defendants agreed to carry an \$11,000.00 note for the balance of the purchase price.

59. At the time of said sale, title to said residence was not transferred to Ruth Alice Spiegelhalter as said Defendants did not own said residence as title appeared to be vested in Ronald Topham and Ann Topham, husband and wife.

....

64. Said residence was subsequently sold in 1998 for the sum of \$101,000.00.

65. Defendants have retained the proceeds from the 1998 sale of the residence which rightfully belong to Ruth Alice Spiegelhalter.

66. Plaintiff has received the sum of \$53,420.00 from the 1998

sale of said residence.

(L.F. 27-28). It is unclear from her pleading if she is attempting to set forth a claim for breach of contract or fraud or conversion. However, it is quite clear that Mrs. Spiegelhalter was not declared disabled or incapacitated until February 6, 1998. (L.F. 105). Similarly, it is quite clear that there was no finding as to when the disability and incapacity of Mrs. Spiegelhalter factually occurred or began. (L.F. 105).

As this Court recently stated, "[a] discovery of assets action, as its name implies, is a search for assets." State ex rel. Knight v. Harman, 961 S.W.2d 951, 954 (Mo. App. 1998). Furthermore, "[t]he action is a 'statutory proceeding similar to the common law actions for trover and conversion.'" Id. The purpose of a discovery of assets action "is to determine whether 'the decedent held title at his death to certain described property and that this property is being adversely withheld by another person.'" Id. at 954-55.

In a discovery of assets proceeding in a decedent's estate, the triggering event appears to be the death of the decedent. In this case, the proper inquiry should be whether Mrs. Spiegelhalter held title to certain property at the time of her adjudication of incapacity and disability which is being adversely withheld from her estate. §475.160.

However, what Ms. Ryan is pleading under Count 10 of her Petition is either that the Gabels somehow defrauded Mrs. Spiegelhalter, or the Gabels breached one of two written contracts for the sale of real estate to Mrs. Spiegelhalter. (L.F. 27-29). Interestingly, Ms. Ryan prays for a money judgment against the Gabels under Count 10, not a transfer of title to Mrs. Spiegelhalter's Estate.

A Missouri circuit court, sitting in its probate jurisdiction, is a court of limited jurisdiction. Probate jurisdiction is conferred on the circuit courts solely by §472.020, R.S.Mo. Under that statute a

probate court can only "hear and determine . . . matters pertaining to probate business. . . ." It cannot hear general tort claims.

In the case of In re Estate of Goldenberg, 601 S.W.2d 637 (Mo. App. 1980), a deceased's widow appealed the dismissal of a discovery of assets lawsuit. The widow alleged in the discovery of assets action, inter alia, that the executors improperly administered her husband's business. The court of appeals affirmed the dismissal regarding the widow's claims regarding the way the business had been run, stating, in pertinent part:

[The statute] deals with the determination of title to, and/or right of possession of, personal property claimed to be an asset of the estate. It is a statutory proceeding similar to the common law actions of trover or conversion. . . The statute is not intended as a device to test general fiduciary conduct, improper administration of the estate, or general disputes between the heirs. . . . In addition to those concededly improper paragraphs, she has alleged improper management of her husband's business by her son, her failure to receive her widow's allowance and tax refunds, and the loss of personal property belonging to her. None of these allegations are relevant to the statutory cause of action she asserts.

Estate of Goldenberg, 601 S.W.2d at 639.

Similarly, the probate court is not the proper forum to try a claim for breach of contract. Matter of Estate of Woodrum, 859 S.W.2d 259, 262 (Mo. App. 1993). In Estate of Woodrum, the court of appeals held that the probate court was not the proper forum to litigate a breach of contract action



against an insurance company whose insured was being sued in a discovery of assets action for allegedly retaining estate property he acquired during while serving as a decedent's conservator during her lifetime.

Furthermore, Ms. Ryan's pleadings are insufficient as a matter of law in that they fail to allege that the Gabels are adversely withholding property of the Estate of Mrs. Spiegelhalter. Section 475.160 controls a discovery of assets action for an incapacitated or disabled person's estate, providing:

**475.160. Assets of protectee, action to obtain, procedure** - Any

conservator, protectee, creditor or other person, including a person interested in expectancy, reversion or otherwise, who claims an interest in property which is claimed to be an asset of the estate of a protectee or which is claimed should be an asset of such an estate, may file a verified petition in any court having jurisdiction of such estate seeking determination of the title and right of possession thereto. The petition shall describe the property, if known, shall allege the nature of the interest of the petitioner and that title or possession of the property, or both, are being adversely withheld or claimed. The court shall proceed on such petition in accordance with the provisions of section 473.340, R.S.Mo.

Ms. Ryan does not allege in Count 10 of her Petition that the Gabels are adversely withholding title or the right of possession to 7140 Kingston Court. (L.F. 27-29). This is because Ms. Ryan knew that the Gabel's conveyed any interest they had in 7140 Kingston Court to John Spiegelhalter in 1996. (T. 202-

03). This conveyance was almost two years prior to Mrs. Spiegelhalter's adjudication of incapacity and disability. (L.F. 11-12).

Mrs. Ryan's own evidence at trial belies her pleading under Count 10 that the Gabels retained the proceeds from the 1998 sale of 7140 Kingston Court. Her evidence was that the property at 7140 Kingston Court was conveyed to John Spiegelhalter by warranty deed dated in April of 1996, from Ron Topham, Gary Gabel's partner. (T. 201-03, EX 9). John Spiegelhalter entered into a contract on with Kingston Court Development Company, not Gary Gabel, for the purchase of 7140 Kingston Court in 1996. (T. 204-05, EX 18). The purchase price was \$85,000.00 payable \$1,000.00 in earnest money, conventional financing in the amount of \$35,000.00 to clear loans on the property, with a balance due at closing of \$49,000.00. (T. 204-05, EX 18).

John Spiegelhalter then obtained a second mortgage on his residence to obtain the \$35,000.00 necessary to clear the debt owing on the property. (T. 205-06). This \$35,000.00 was paid to the Gabels at the time John Spiegelhalter obtained the loan on his residence. (T. 210). Subsequently, on January 21, 1998, John Spiegelhalter received a contract for the sale of the property. (T. 211-12, EX 10).

Per the settlement statement relating to the January 21, 1998 sale, John Spiegelhalter, not the Gabels, received net proceeds of \$91,822.54. (T. 212-13, EX 7). Out of the net proceeds, John Spiegelhalter paid off the second mortgage on his residence in the balance of \$33,960.23. (T. 213-14, EX 7). He also withheld an escrow for anticipated tax liability in the amount of \$3,580.00. (T. 214, EX 7). Finally, \$53,420.00 was paid to Ms. Ryan on behalf of Mrs. Spiegelhalter. (L.F. 28, T. 94-95).

Mrs. Ryan does not allege that John Spiegelhalter adversely withheld any money or property out of any transaction involving 7140 N. Kingston Court. He is not even named in Count 10 of her

Petition. (L.F. 27-29). John Spiegelhalter repaid a second mortgage to himself used to clear loans against the property so that he could close on it and later sell it for \$101,000.00.

Ms. Ryan's pleadings and her own evidence reveal that the probate court lacked jurisdiction over Count 10 of the Petition. First, Ms. Ryan failed to allege that the Gabels adversely withheld estate property under this count. Second, Ms. Ryan's own evidence clearly revealed that the Gabels did not own or transfer any interest in 7140 Kingston Court for nearly two years prior to Mrs. Spiegelhalter's adjudication of incapacity and disability. Finally, Ms. Ryan's own evidence reveals that John Spiegelhalter, not the Gabels received the proceeds of the 1998 sale of 7140 Kingston Court.

**3. THE PROBATE COURT ERRED WHEN IT DENIED THE GABELS' MOTION TO DISMISS FILED PRIOR TO TRIAL REGARDING COUNT 10 OF THE PETITION BECAUSE COUNT 10 WAS ABSOLUTELY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS, EITHER §516.110 R.S.MO. (1994), THE TEN YEAR STATUTE, OR §516.120 R.S.MO. (1994), THE FIVE YEAR STATUTE, IN THAT BEVERLY SUE RYAN FILED HER LAWSUIT ON DECEMBER 11, 1998, AND THE WRITTEN CONTRACT UPON WHICH SHE BASES HER LAWSUIT WAS DATED EITHER JANUARY 15, 1988 OR DECEMBER 3, 1988, AND THE RIGHT TO SUE, IF ANY, AROSE AT THE TIME THE GABELS FAILED TO DELIVER A DEED TO MRS. SPIEGELHALTER.**

#### **STANDARD OF REVIEW**

The Gabels contend that the probate court erred when it denied their motion to dismiss based upon the fact that Ms. Ryan's Petition was filed after the running of the applicable statute of limitations. As set forth herein, this challenge to the Petition is based entirely on the Petition and the two Exhibits attached thereto. "Normally, the running of the statute is a question of law for the court to decide." Lomax v. Sewell, 1 S.W.3d 548, 552 (Mo. App. 1999). A question of law is subject to de novo review in this Court. Local 719 Intern. Ass'n of Firefighters v. City of Independence, 996 S.W.2d 112, 115 (Mo. App. 1999).

Generally, "[a] statute of limitations allows the cause of action to accrue and then cuts off the claim if suit is not filed within a certain period of time." Lomax, 1 S.W.3d at 552. Furthermore, "[t]he running of the applicable statute of limitations is an affirmative defense and must be pleaded pursuant to Rule 55.08." Id. at 552. Finally, "[t]he party asserting the affirmative defense of the running of the applicable statute of limitations has the burden of not only pleading but proving it." Id. at 552.

However, this case was commenced in, and at all times remained in the probate division of the circuit court. At no time did the trial court order that Rule 55.08 apply to this proceeding as required by Rule 41.01(b). Additionally, the application of Rule 55.08 to appellants in this case is contrary to the decision of the Southern Division of this Court in *Duncan v. Estate of Booker*, 816 S.W.2d 705 (Mo. App. 1991).

Generally, Rule 55.08 requires a party to plead a specific statute of limitation if relying on the affirmative defense of bar by statute of limitation to a lawsuit filed against the party. However, the underlying lawsuit in this case was filed as a discovery of assets lawsuit pursuant to §473.340 R.S.Mo. (2000). Since the underlying lawsuit was filed in the probate division of the circuit court, Rule 41.01(b)

relieves appellants from the "specificity in pleading" requirements of Rule 55.08. Rule 44.01(b) provides:

Rules 41, 54.18, 55.03, 56, 57, 58, 59, 60, 61 and 62 apply to proceedings in the probate division of the circuit court. The judge of the probate division may order that any or all of the other Rules 41 through 101 or specified subdivisions of the rules shall be applicable in a particular matter. Any such order shall specify the rules or subdivisions to be applied and a time for compliance with the order. The order shall be served upon all of the parties.

By the express language of Rule 41.01(b), Rule 55.08 does not apply to this proceeding and appellants were not required to cite a specific statute of limitation which they contend barred plaintiff's lawsuit. Furthermore, no order by the trial court was entered requiring appellants to comply with Rule 55.08. (L.F. 1-7). Similarly, no order was served upon the parties reflecting the application of Rule 55.08 in this case. (L.F. 1-7).

The application of Rule 55.08 to appellants in this case is also contrary to the prior decision of the Southern Division of this Court in the case of *Duncan v. Estate of Booker*, 816 S.W.2d 705 (Mo. App. 1991). In *Estate of Booker*, the court declared that "[i]n the probate division, in the absence of an order invoking Rule 55, the defense of the statute of limitations may be asserted without pleading it." *Id.* at 708. Therefore, appellants were not required to plead the bar of the applicable statute of limitation to respondent's petition.

Additionally, respondent's petition was barred on its face by either §516.110 R.S.Mo. (ten year statute) or §516.120 (five year statute). Plaintiff's petition for discovery of assets under the count in question was barred on its face by the statute of limitation because "[i]t is clear under the cases that

where it clearly appears from the petition that a cause of action is barred by limitations, a motion to dismiss on that ground is properly sustained." *Miller v. Larson*, 712 S.W.2d 56 (Mo. App. 1986). In this case, respondent filed her lawsuit against appellants and others on December 11, 1998. (L.F. 13). Respondent bases her entire claim under Count X of her petition on a written contract dated December 3, 1988. (L.F. 27-29; 37; T. 217-18). On its face, plaintiff's petition is barred by both the five and ten year statutes of limitations cited herein.

However, appellants did specifically raise the bar of the statute of limitation at the hearing on appellants' motion to dismiss:

MR. DECUYPER:

. . . .

AND THAT'S WHAT HE PLEADS. HE DOESN'T EVEN PLEAD THE CONTRACT FOR DEED, AND SO HE'S OUT OF TIME ON THAT. HE'S OUT OF TIME ON THE JANUARY 15TH, 1988. HE'S OUT OF TIME ON THE DECEMBER 3RD, 1988. AND THE DECEMBER, I BELIEVE IT'S THE CONTRACT FOR DEED -- I'M SORRY, IT'S DECEMBER 20TH, '88.

HE FILED HIS PETITION ON DECEMBER 11TH OF 1998. SO, ALL OF THE, THE FIRST TWO CONTRACTS THE TEN YEAR STATUTE APPLIES. THE FRAUD ALLEGATION IS FIVE, AND THAT'S GONE.

. . . .

(T. 30).

Based upon their written motion to dismiss and answer, the trial court and the respondent were sufficiently apprised of appellants' defense of statute of limitations as required by law. Furthermore,

appellants orally informed the trial court of what statutes of limitations the contended barred plaintiffs' lawsuit. Nothing more was required under the law, and Count X should have been dismissed.

In this case, Ms. Ryan alleged the following, among other things in Count 10 of her Petition on behalf of Mrs. Spiegelhalter:

57. Plaintiff, based upon information and belief, believes that Defendants Teresa Gabel and Gary Gabel purported to sell a townhouse located at 7140 N. Kingston Court Dr., Gladstone, Clay County, Missouri to Ruth Alice Spiegelhalter on either January 15, 1988 or on December 3, 1998. A copy of two Contracts for the sale of Real Estate are attached hereto as Exhibits A and B and incorporated herein by reference.

58. Plaintiff based upon information and belief believes that \$49,000.00 was removed from a bank account of Ruth Alice Spiegelhalter and paid to Defendants toward the purported purchase of said residence and that Defendants agreed to carry an \$11,000.00 note for the balance of the purchase price.

59. At the time of said sale, title to said residence was not transferred to Ruth Alice Spiegelhalter as said Defendants did not own said residence as title appeared to be vested in Ronald Topham and Ann Topham, husband and wife.

....

64. Said residence was subsequently sold in 1998 for the sum of

\$101,000.00.

65. Defendants have retained the proceeds from the 1998 sale of the residence which rightfully belong to Ruth Alice Spiegelhalter.

66. Plaintiff has received the sum of \$53,420.00 from the 1998 sale of said residence.

(L.F. 27-28). This Petition was filed by Ms. Ryan on December 11, 1998. (L.F. 1, 13). According the Petition itself, the two written documents upon which Ms. Ryan based her cause of action were dated January 15, 1988 and December 3, 1988, respectively. (L.F. 27, 35-37).

The Gabels filed a motion to dismiss and answer to Ms. Ryan's Petition on February 5, 1999.<sup>6</sup> (L.F. 2, 61-73, 77-79). The Gabels moved the probate court to dismiss the cause of action set forth in Count 10 of the Petition as barred by the applicable statute of limitations. Similarly they affirmatively plead in their Answer that the cause of action set forth in Count 10 was barred by the applicable statute of limitations. (L.F. 67, 77).

Section 516.120 provides, in pertinent part:

**Within five years:**

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except

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<sup>6</sup> The parties entered into a written stipulation filed with the probate court extending the time for the Gabels and Jane Weimhold to answer or otherwise plead in response to Ms. Ryan's Petition until February 5, 1999.



upon judgments or decrees of a court of record, and except where a  
different time is herein limited;  
. . . .

Furthermore, Sec. 516.110 provides, in pertinent part:

**Within ten years:**

(1) An action upon any writing, whether sealed or unsealed, for the  
payment of money or property;  
. . . .

According to the Missouri Supreme Court, "[t]hese statutes [ §§516.110 and 516.120] have a hoary tenure in Missouri law." Hughes Development Co. v. Omega Realty Co., 951 S.W.2d 615, 616 (Mo. banc. 1997). Hughes Development Co. sued Omega Realty Co. for breach of contract over an alleged underpayment of an apartment management fee. Id. Omega Realty Co. contended that the suit was barred by §516.120, the five year statute of limitations for breach of contract, since the contract between the two real estate management companies was entered into in 1988 and suit was not commenced until 1995. Id.

After reviewing precedent dating from the turn of the century, the Supreme Court decided to ignore this confusion and rely on the plain language of §516.110. Id. at 617. The Court held that "[t]aken at its plain meaning, section 516.110(1), the ten-year statute of limitations applies to every breach of contract action in which the plaintiff seeks a judgment from the defendant for payment of money the defendant agreed to pay in a written contract." Id.

In this case, neither the contract dated January 15, 1988 nor the contract dated December 3, 1988 states that the Gabels agreed to pay money to Mrs. Spiegelhalter. According to both contracts

for the sale of real estate, the Gabels were allegedly agreeing to deliver a deed to Mrs. Spiegelhalter. Generally, "[a] cause of action for breach of contract accrues and the right to sue arises on the failure to do the thing contracted for at the time and in the manner contracted." Jordan v. Willens, 937 S.W.2d 291, 295 (Mo. App. 1996).

Here, the plaintiff bases her Petition upon one of two written contracts for the sale of real estate that were incorporated by reference into her Petition. She alleges that Mrs. Spiegelhalter paid \$49,000.00 to the Gabels toward the purchase of 7140 N. Kingston Court. (L.F. 27). Both contracts recite that the down payment was paid to the seller and that the seller acknowledged receipt of same. (L.F. 35-37). Ms. Ryan pleads that title to the real property was transferred to Mrs. Spiegelhalter. (L.F. 27). Ms. Ryan did not file her Petition until December 11, 1998. Ms. Ryan's Petition under Count 10 is barred on its face by either §516.110 or §516.120.

Here, the plaintiff failed to commence suit within either 5 or 10 years of the purported written contract at issue. Therefore, any action on the purported written contract, which plaintiff claims resulted in damage **at the time of the purported sale**, was required to be filed, at the latest by either December 3, 1993 or December 3, 1998. Plaintiff failed to meet either of these mandatory deadlines.

Furthermore, in response to the Gabels' affirmative defenses set forth in their Answer, Ms. Ryan responded as follows:

1. Plaintiff denies each and every affirmative defense set forth by said Defendants.

(L.F. 80). Generally, "[a] party attempting to avoid the running of a statute of limitations by way of an avoidance has the burden to prove the avoidance or exception relied upon. Lomax, 1 S.W.3d at 553. Furthermore, the party attempting to avoid the statutory bar, based upon an exception, must plead the

exception to the bar. Bosworth v. Sewell, 918 S.W.2d 773, 778-79 (Mo. banc. 1996). Here, Ms. Ryan set forth no avoidance to the running of the statute of limitations. She never claimed any legal disability which would prevent the running of the applicable statute of limitations, nor did she plead any.

Similarly, it is undisputed that there was never a finding as to when the disability or incapacity of Mrs. Spiegelhalter factually or actually occurred. (L.F. 105). Even though Mrs. Spiegelhalter was declared incapacitated and disabled on February 6, 1998, there was never any proof that she was incapacitated before that time. (L.F. 105). Generally, "[w]hile a contract made by one under a guardianship by reason of incompetency is void, a contract made prior to adjudication but while the person is under mental disability is only voidable." Cohen v. Crumpacker, 586 S.W.2d 370, 374 (Mo. App. 1979). Ms. Ryan pleads no facts to rebut this presumption of competency of Mrs. Spiegelhalter prior to the probate court's February 6, 1998 adjudication.

In summary, Ms. Ryan's petition is barred on its face by the running of the applicable statute of limitations, either §516.110, the ten year statute or §516.120, the five year statute. She bases her petition on one of either two written contracts for the sale of real estate dated January 15, 1988 and December 3, 1988 respectively. However, she did not file suit until December 11, 1998. She pleads no avoidance to the running of the applicable statute of limitations. Therefore, this Court should reverse the judgment of the trial court under Count 10 of Ms. Ryan's Petition and enter judgment in favor of appellants Gary and Teresa Gabel under Count 10 and award them their costs incurred herein.

### **CONCLUSION**

This Court should reverse the judgment of the probate court against Gary and Teresa Gabel under Count 10 of Ms. Ryan's Petition, and enter judgment in favor of the Gabels thereunder, including an award for their costs incurred.

First there was no evidence before the probate court, let alone substantial evidence that the Gabels adversely withheld and property belonging to Mrs. Spiegelhalter's estate. Mrs. Spiegelhalter was declared incapacitated and disabled on February 6, 1998. (S.O.F. at 15 ). The Gabels had no ownership interest whatsoever in 7140 Kingston Court after April of 1996 when the condominium was purchased by John Spiegelhalter. (S.O.F. at 14). Mrs. Spiegelhalter's entire down payment was returned to her estate plus an additional \$4,420.00. (S.O.F. at 14). Finally all proceeds from the 1998 sale of the condominium were received by John Spiegelhalter, not the Gabels. (S.O.F. at 14-15). The probate court made no finding that John Spiegelhalter adversely withheld property of Mrs. Spiegelhalter's estate and should have similarly entered judgment for the Gabels under Count 10 of Ms. Ryan's Petition.

Second, Ms. Ryan's pleadings and her own evidence reveal that the probate court lacked jurisdiction over Count 10 of the Petition. Ms. Ryan failed to allege that the Gabels adversely withheld estate property under this count. Ms. Ryan's own evidence clearly revealed that the Gabels did not own or transfer any interest in 7140 Kingston Court for nearly two years prior to Mrs. Spiegelhalter's adjudication of incapacity and disability. Finally, Ms. Ryan's own evidence reveals that John Spiegelhalter, not the Gabels received the proceeds of the 1998 sale of 7140 Kingston Court.

Third, Ms. Ryan' petition is barred on its face by the running of the applicable statute of limitations, either §516.110, the ten year statute or §516.120, the five year statute. She bases her petition on one of either two written contracts for the sale of real estate dated January 15, 1988 and December 3, 1988 respectively. However, she did not file suit until December 11, 1998. She pleads no avoidance to the running of the applicable statute of limitations. Therefore, this Court should reverse the judgment of the trial court under Count 10 of Ms. Ryan's Petition and enter judgment in favor of appellants Gary and Teresa Gabel under Count 10 and award them their costs incurred herein.

Respectfully submitted,

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**IN THE MISSOURI SUPREME COURT**

<b>BEVERLY SUE RYAN, P.A.,</b>	)	
<b>CONSERVATOR FOR THE ESTATE OF</b>	)	
<b>RUTH SPIEGELHALTER</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>SC83805</b>
	)	
<b>WILLIAM SPIEGELHALTER, ET AL.,)</b>	)	
	)	
<b>Respondents,</b>	)	
	)	
<b>GARY AND TERESA GABEL,</b>	)	
	)	
<b>Appellants.</b>	)	

**APPELLANTS' CERTIFICATE**

Come now appellants, by and through counsel and certify to the Court that foregoing brief, and all copies filed and served in accordance with Rule 84.06(g):

1. Comply with Rule 55.03;
2. Comply with the limitations set forth in Rule 84.06(b);
3. Contain 12,029 words according to Microsoft Word for Windows software;

Appellants also certify that a copy of the foregoing brief was stored on an IBM-PC compatible 1.44 MB, 3 1/2 -inch size floppy disk which was scanned for viruses with Norton Anti-Virus software and that according to said software, the floppy disk and all copies of same were virus free.

Finally, on this 7th day of September, 2001, a copy of the foregoing brief, in both the format required pursuant to Rule 84.06(b) and 84.06(g) was served on all counsel of record and all pro-se parties of record by placing same in the U.S. Mail, postage prepaid, and addressed as follows: Steven M. Petry, Attorney at law, 6000 N. Oak Trfwy, Suite 201, Kansas City, Missouri 64118, Attorney for Respondent Beverly Sue Ryan, P.A. Conservator for the Estate of Ruth Alice Spiegelhalter; Teresa M. Terry, Attorney at law, One Victory Drive, Suite 204, Liberty, MO. 64068, Attorney for Respondent James Spiegelhalter; and John Spiegelhalter, 5931 W. 86th Terr., Overland Park, KS 66207, Respondent Pro Se; Mary Ann Wilson, 337 I Avenue, Coronado, CA 92218, Respondent Pro Se; William Spiegelhalter, 490 Glenwood Ave., Satellite Beach, FL. 32937, Respondent Pro Se; Albert Michael Spiegelhalter, 12 N.E. 88th Terr., Kansas City, MO. 64155, Respondent Pro Se; and Albert T. Spiegelhalter, Sr., 10420 S. Mockingbird Ln., Olathe KS. 66061, Respondent Pro Se.

Respectfully submitted,

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